Office-Supreme Court, U.S.
FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2048

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MATSON PLASTERING CO., INC.,
Petitioner,

VS.

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO, PLASTERERS LOCAL UNION NO. 295,
Respondent.

MATSON PLASTERING CO., INC.,
Petitioner,

VS.

LATHERS LOCAL UNION L-109, and DEAN PUTHUFF,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

DAVID A. ROSENFELD
COUNSEL OF RECORD
VICTOR J. VAN BOURG
VAN BOURG, ALLEN, WEINBERG & ROGER
875 Battery Street
San Francisco, CA 94111
Telephone: (415) 864-4000
Attorneys for Respondents

BOWNE-PERRAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300
33

TABLE OF CONTENTS

Page

I

Counter-statement of the issues presented 1

II

Counter-statement of the case 2

III

The court lacked jurisdiction to enjoin a strike which is arguably in breach of the no-strike clause 3

IV

In both collective bargaining agreements the parties have exempted the particular dispute involved from the grievance and/or no-strike obligation 3

V

There are independent reasons why the injunctions were improper 8

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases

Page

Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc., 529 F.2d (9th Cir. 1976), vacated and remanded on other grounds, 429 U.S. 807 (1976), reversed on other grounds, 550 F.2d 1237 (9th Cir. 1977) 8

Boys Market v. Retail Clerks Union Local 770, 398 U.S. 235 (1970) 2, 3, 7

Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397 (1976) 3, 7

Detroit Newspaper Publishers' Association v. Detroit Typographical Union No. 18, 471 F.2d 872 (6th Cir. 1972) 8

Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254 (1962) 5

Emery Air Freight Corporation v. Local Union 295, 449 F.2d 586 (2nd Cir. 1971) 8

Gateway Coal Company v. United Mine Workers, 414 U.S. 368 (1974) 6, 7

Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974) 8

Layne-Western Co. v. Operating Engineers Local 513, ... F.2d. ....., 107 LRRM 2742 (8th Cir. 1981) 6

Martin Hageland, Inc. v. United States District Court, 460 F.2d 789 (1972) 6

United States Steel v. United Mine Workers, 456 F.2d 683 (3d Cir. 1972) 8

Table of Authorities Cited

Rules

	Page
Federal Rules of Civil Procedure:	
Rule 12(b)(6)	2
Rule 65	7

Statutes

29 U.S.C.:	
Section 104 (Norris-LaGuardia Act)	7
Section 107	7, 8
Section 186	4

No. 80-2048

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MATSON PLASTERING CO., INC.,
Petitioner,

vs.

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO, PLASTERERS LOCAL UNION NO. 295,
Respondent.

MATSON PLASTERING CO., INC.,
Petitioner,

vs.

LATHERS LOCAL UNION L-109, and DEAN PUTHUFF,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

I

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Whether strikes which are arguably in violation of a no-strike clause contained in a collective bargaining agreement are enjoinable under the rule established by

Boys Market v. Retail Clerks Union Local 770, 398 U.S. 235 (1970)?

2. Whether parties to a collective bargaining agreement may exempt from the no-strike obligation and/or the grievance procedure specific disputes, so as to preclude the exercise of jurisdiction by a district court to enjoin a strike?

II

COUNTER-STATEMENT OF THE CASE

This is a petition for writ of certiorari from two judgments of the Ninth Circuit involving the same employer but different labor organizations. In both cases, the district court issued an *ex parte* temporary restraining order as well as an order to show cause. In both cases, counsel appeared at the hearing and moved to dismiss the complaints. F.R. Civ. P. 12(b)(6). After denying those motions, the district court entered preliminary injunctions enjoining strike activity. The district court did not hold an evidentiary hearing or enter findings of fact to support the injunctive decrees.

The unions which were subject to those decrees appealed to the Court of Appeals for the Ninth Circuit. The Ninth Circuit in both cases reversed finding that the court lacked jurisdiction to enjoin the strikes and remanded for further appropriate proceedings.

We shall show in this memorandum that no substantial issue warranting review by this Court is present.

III

THE COURT LACKED JURISDICTION TO ENJOIN A STRIKE WHICH IS ARGUABLY IN BREACH OF THE NO-STRIKE CLAUSE

Each of the collective bargaining agreements between Lathers Local L-109 and Operative Plasterers and Cement Masons Local 295 contains an explicit no-strike clause. Implicit within the question, as posed by the Petitioner, is an argument that a district court has jurisdiction to enjoin a strike which arguably violates a no-strike clause. That proposition has been squarely rejected by this Court and we need not deal with it further. See *Boys Market v. Retail Clerks Union Local 770*, 398 U.S. 235, 253-256 (1970); and *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397, 409 (1976).

We now turn to the other issue raised as to whether the parties may exempt certain grievances from the implied or expressed no-strike obligation, thus barring injunctive relief under the doctrine of *Boys Market, supra*.

IV

IN BOTH COLLECTIVE BARGAINING AGREEMENTS THE PARTIES HAVE EXEMPTED THE PARTICULAR DISPUTE INVOLVED FROM THE GRIEVANCE AND/OR NO-STRIKE OBLIGATION

We now turn briefly to the dispute involved. Matassa Plastering is party to a collective bargaining agreement

with both the Lathers as well as the Operative Plasterers.[1] Matson was delinquent in certain trust fund contributions and was assessed $775.78 for late payment of contributions to trust funds.[2] As a result of the employer's refusal to pay the assessment, first the Plasterers and then the Lathers took strike action to force payment of the delinquency charge.

We now turn to the precise language in the collective bargaining agreement which is relevant to this issue. The agreement with the Plasterers provides:

> Notwithstanding any provisions in the Agreement to the contrary, no dispute, complaint or grievance arising out of the failure or refusal of an employer to comply with the Union Security and hiring hall, wages, transportation, health and welfare, pension, vacation, fringe benefits or other remuneration shall be subject to the grievance or arbitration provisions

---

[1]Matson raises a question as to whether it was bound to the Plasterers Agreement when the trust fund obligation arose. Since the district court failed to enter findings, or hold an evidentiary hearing, that issue has not been resolved. If Matson was not bound to the contract at the time the trust fund obligations arose, then there would clearly be no obligation to arbitrate the dispute on the union's part. If Matson was bound, then the principles discussed above apply.

[2]The court below erroneously referred to this assessment as being levied "by the Union for late payment of contributions to the Union trust fund." The levy was by jointly trusteed trust funds, 29 U.S.C. Section 186. The employer contends, however that the assessment was levied by the union and not by either the trust funds or a joint conference committee consisting of employer and union representatives. That issue was not resolved by the district court and the pleadings submitted by the employer are less than clear on this point. It is, however, agreed that an assessment was made in the amount specified.

of this contract. It shall not be a violation of this Agreement for the Union to withdraw its members, or to refuse to man any job of an employer who fails or refuses to comply with the provisions herein contained and such a withdrawal of members or refusal to man the job shall not be a strike or work stoppage within the terms of this Agreement." Article XIV, Section 2(f) (Appendix H to Petition).

* * *

"Any employer who becomes signatory to this Agreement and is owing wages, travel pay, fringes and/or assessed penalties in another area not covered by this Agreement, the union may remove employees from any shop or job of any individual delinquent employer, and refuse to furnish employees to said delinquent employer until full payment has been made." Article XIII, Section 1 (Appendix G to Petition).

Given these two clauses which specifically exempt from the no-strike provisions and the grievance procedure questions of delinquencies, we submit that the court below had no alternative but to find that there was no jurisdiction to

---

[2] The company suggests in its petition that the union misreads both exceptions. We believe the courts below properly resolved that issue. In any case, this matter has been remanded to the district court for further proceedings to determine whether the union should be forced to arbitrate the question of whether it violated the collective bargaining agreement in taking strike action. Cf. *Drake Bakeries, Inc.* v. *Local 50, Bakery Workers*, 370 U.S. 254 (1962). We do not concede, however, that the employer's claim against the union for damages is timely or appropriate. In any case, the grant of injunctive relief is discretionary and where it so clearly appears that the parties have attempted to exempt these issues from grievance and the no-strike obligation, the district court improperly enjoined the strike.

enjoin the strike. This Court has specifically recognized that parties may exempt issues from the no-strike obligation, thus precluding the exercise of jurisdiction by a court to enjoin a strike. See *Gateway Coal Company v. United Mine Workers*, 414 U.S. 368, 382-384 (1974). See also *Layne-Western Co. v. Operating Engineers Local 513*, ____ F.2d ____, 107 LRRM 2742 (8th Cir. 1981); and *Martin Hagelaad, Inc. v. United States District Court*, 460 F.2d 789 (1972).

We now turn to the Lathers' Agreement. The Lathers' Agreement provides as follows:

> "At any time when any employer is delinquent in making payment to any of said funds, the Union may remove employees from any shop or job of the delinquent employer and refuse to furnish employees to such shop or job." Article XVI(3)(e) (Appendix I to Petition).
>
> • • •
>
> "There shall be no strikes, slow downs, stoppages of work, or lockouts unless the charged party fails to abide by the decision of the Joint Committee or impartial arbiter." Article XX(7)(h) (Appendix J to Petition).

Matson concedes that it was delinquent in making payment to the various trust funds. It, however, argues that it had paid the contribution and was only delinquent in remitting the delinquency fee. Consistent with the principles expressed above, the court properly concluded that the parties had expressed an intent to permit the union to take economic action.

Moreover, the contract specifically provides that the union may strike where "the charged party fails to abide by the decision of the Joint Committee . . ."[6]

Under the principles expressed above, no injunction was permissible under the Lathers' Agreement because of the parties' expressed intent to remove from the no-strike obligation and/or the grievance procedure precisely the dispute which arose in this case.

In summary, the teaching of *Boys Market*, as explained by *Gateway Coal* and *Buffalo Forge*, is that *Boys Market* is a narrow exception to the broad prohibition against the exercise of jurisdiction to enjoin strikes contained in the Norris-LaGuardia Act, 29 U.S.C. Section 104. Here with respect to both the Lathers and Plasterers, the collective bargaining agreements either exempt the dispute from the grievance procedure or expressly permitted the union to take strike action.[7]

---

[6]Matson contends that the Joint Committee did not make a decision assessing the penalty, but rather that the unions involved made the assessment. Once again, the district court did not resolve this factual issue and the record is insufficient in this regard.

[7]The employer rests its argument upon a contention that the union is arguably wrong with respect to the interpretation of the breadth of the no-strike clause and/or the exemption from the grievance procedure. The teaching of these cases, however, is that the district court must evaluate the claims of the union as to the nature of the strike and the dispute involved. Not only do we contend that the court of appeal was correct in the resolution of this issue, but also the failure of the district court to follow the procedures outlined in F.R. Civ. P. 65, as well as 29 U.S.C. Section 107, make this case unsuitable for review by this Court.

V

THERE ARE INDEPENDENT REASONS WHY THE INJUNCTIONS WERE IMPROPER

In response to the order to show cause, counsel for the unions moved to dismiss the actions. After those motions were denied, counsel requested that the court hold an evidentiary hearing prior to the issuance of any injunctive decree. The court declined. Thereafter, the court issued injunctive decrees without entering findings of fact or conclusions of law. We submit that the procedural requirements of Norris-LaGuardia applied and the district court's failure to follow those mandates made the injunctions void. 29 U.S. C. § 107. See, *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc.*, 529 F.2d 1073 (9th Cir. 1976), *vacated and remanded on other grounds*, 429 U.S. 807 (1976), *reversed on other grounds*, 550 F.2d 1237 (9th Cir. 1977); *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974); *Detroit Newspaper Publishers' Association v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972); *Emery Air Freight Corporation v. Local Union 295*, 449 F.2d 586 (2nd Cir. 1971); and *United States Steel v. United Mine Workers*, 456 F.2d 483 (3d Cir. 1972).

CONCLUSION

For the reasons suggested above, the petition for writ of certiorari should be denied.

Dated: August 1981

Respectively submitted,

VAN BOURG, ALLEN, WEINBERG & ROGER
VICTOR J. VAN BOURG
DAVID A. ROSENFELD
COUNSEL OF RECORD
Attorneys for Respondents